

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JICARILLA APACHE NATION)
)
 Plaintiff,)
)
 v.)
)
 U.S. DEPARTMENT OF THE INTERIOR)
)
 and)
)
 DIRK KEMPTHORNE,)
 Secretary of the Interior,)
)
 Defendants.)
 _____)

Case No. 1:08-cv-00316
Judge John D. Bates

NOTICE OF PROPOSED BRIEFING SCHEDULE

Plaintiff Jicarilla Apache Nation ("Jicarilla"), Defendants the U.S. Department of the Interior and Dirk Kempthorne, Secretary of the Interior (collectively, "the Department"), and Proposed Intervenor Merit Energy Company ("Merit") state as follows:

1. On May 1, 2008, Jicarilla filed an Amended Complaint in this action. (Dkt. 7.)
2. On August 7, 2008, the Department filed an Answer raising two affirmative defenses. (Dkt. 11.) The first affirmative defense states: "Plaintiff fails to state a claim upon which relief can be granted." (Id. at 7.) The second states: "This court lacks jurisdiction over the subject matter of this case." (Id. at 8.)
3. On August 13, 2008, this Court issued an Order stating that it has reviewed the Amended Complaint and Answer, that the Department has "raise[d] grounds for dismissal or judgment, but ha[s] not yet filed a dispositive motion[,]" and ordered the parties to "confer and submit by not later than September 4, 2008, a proposed briefing schedule for the filing of dispositive motions to resolve this matter." (Dkt. 12.)

4. Following the entry of this Court's Order, Merit notified Jicarilla and the Department that Merit intended to intervene in this case. Merit intends to file its motion to intervene and an answer to Jicarilla's Amended Complaint on or before September 5, 2008. Merit stated that it may raise an affirmative defense relating to lack of subject matter jurisdiction, as did the Department. Jicarilla believes that Merit's intervention is not necessary as the Department can adequately represent Merit's interests, but Jicarilla will not oppose Merit's proposed intervention. The Department also will not oppose Merit's proposed intervention.

5. Pursuant to the Court's Order, on August 28 and September 2, 2008, Jicarilla, the Department, and Merit conferred by telephone regarding a proposed schedule for the filing by the Department and Merit of dispositive motions pertaining to the affirmative defenses raised in the Department's Answer and anticipated in Merit's Answer.

6. The parties have agreed to the following briefing schedule:
- The Department shall file the administrative record no later than October 6, 2008.
 - The parties shall file motions to supplement the record, if any, no later than October 21, 2008.
 - The Department does not intend to challenge this Court's subject matter jurisdiction or file a dispositive motion regarding the affirmative defense of lack of subject matter jurisdiction since it is the Department's position that the August 3, 2007 decision by the IBLA is a final agency action. The Department similarly does not intend to contend that the Complaint fails to state a claim upon which relief could be granted or file a dispositive motion on that ground.

- Merit, if permitted to intervene and decides to pursue affirmative defenses, shall file any dispositive motion regarding those affirmative defenses on or before November 5, 2008.
- Jicarilla shall file any opposition to the dispositive motion regarding the Proposed Intervenor's affirmative defenses on or before December 5, 2008.
- Merit shall file any reply in support of its dispositive motion on or before December 22, 2008.

7. If the dispositive motion is denied or if Merit is permitted to intervene but does not raise affirmative defenses in its answer, the parties shall reconvene to discuss a proposed schedule for further proceedings in this action.

Respectfully submitted,

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Respectfully submitted,

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